# Masha Singh a/l Bhagat Singh v Goh Chuan Hin & Ors

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO N-02-429 OF 1995
SITI NORMA YAAKOB, MAHADEV SHANKAR AND DENIS ONG JJCA
20 NOVEMBER 1997

***Evidence*** *— Witness — Discrepancy in evidence — Contradictions in appellant's evidence as to amount of deposit paid — Trial judge rejected all of appellant's evidence on this ground — Whether judge had misdirected himself in failing to consider other aspects of the evidence*

A vendor ('Cheok') had entered into a sale and purchase agreement to sell the whole of a plot of land to the first, second, third and fourth respondents for a consideration of RM263,244. The sale and purchase agreement dated 14 June 1984 ('the June agreement') was prepared by the fifth respondent. The fifth respondent subsequently prepared a second sale and purchase agreement ('the July agreement') executed by the first, second, third and fourth respondents with the appellant, wherein the first, second, third and fourth respondents as vendors agreed to sell an undivided half share of the same land that they had purchased from Cheok to the appellant for the agreed price of RM650,000.

A deposit of RM50,000 was acknowledged by the first, second, third and fourth respondents to have been received from the appellant but the evidence shows that only part of it amounting to RM37,300 was proven to have been paid. It is the appellant's case that after he executed the July agreement and after he had made the deposit, he discovered that the first, second, third and fourth respondents had no capacity to transfer the property to him as the land was never registered in their names. He further claimed that he would not have agreed to purchase the property if the respondents had not assured and represented to him that the purchase price due to Cheok under the June agreement had already been paid in full and that subdivision of the property would be carried out upon the execution of the July agreement. The appellant claimed for, inter alia, a refund of the RM50,000 deposit and damages for misrepresentation against all five respondents. On the other hand, the first, third and fourth respondents deny that they had misrepresented any fact to the appellant but that it was the appellant who had breached the agreement for failing to pay the balance of the purchase price of the land by the completion date and as such, they terminated the agreement and forfeited the deposit. The trial judge assessed the appellant's evidence to be inconsistent and rejected it altogether, on the ground that there were contradictions in the appellant's evidence and that he could not be believed. The appellant appealed against the dismissal of his claims.

**Held**, allowing the appeal and ordering a refund to the appellant:

The contradictions appearing in the appellant's evidence lay in his poor recollection of the amount he actually paid as deposit under the July agreement. Since the contradiction lay in one aspect of his evidence and that there was a concession made on his behalf that only RM37,300 was paid as deposit, the trial judge had misdirected himself when he failed to consider the other aspects of the appellant's testimony. Had he done so, there was sufficient evidence to give rise to the inference that the first, second, third and fourth respondents could have represented anything to the appellant in their efforts to make a quick gain. The trial judge had therefore erred in rejecting the whole of the appellant's evidence on the basis of contradictions which only effected one aspect of his evidence. He overlooked the fact that the back-to-back agreements and the unusual facts of this case wholly supported the credibility of the appellant's contentions.

Although the July agreement should have put the appellant on notice that the first, second, third and fourth respondents were not the registered proprietors of the land, it was still probable that representations in the manner described by the appellant were uttered and he had acted upon them to his detriment. In this instance, the detriment happened when his RM37,300 deposit was forfeited upon termination of the July agreement. At the same time, the first, second, third and fourth respondents had no capacity to make an application to the relevant authorities to partition the land upon the execution of the agreement as they were only beneficial owners as opposed to registered owners (see pp 742E–I and 743A–C).

**[Bahasa Malaysia summary**

Seorang penjual ('Cheok') telah mengikat suatu perjanjian jual beli untuk menjual keseluruhan satu plot tanah kepada penentang pertama, kedua, ketiga dan keempat untuk balasan sebanyak RM263,244. Perjanjian jual beli bertarikh 14 Jun 1984 ('perjanjian Jun') telah disediakan oleh penentang kelima. Penentang kelima kemudiannya menyediakan perjanjian jual beli yang kedua ('perjanjian Julai') yang dilaksanakan oleh penentang pertama, kedua, ketiga dan keempat dengan perayu, yang mana penentang pertama, kedua, ketiga dan keempat sebagai penjual bersetuju menjual setengah bahagian tanah tersebut yang tidak dibahagikan yang dibeli daripada Cheok kepada perayu untuk harga yang disetujui sebanyak RM650,000.

Deposit sebanyak RM50,000 diakui telah diterima daripada perayu oleh penentang pertama, kedua, ketiga dan keempat tetapi keterangan menunjukkan bahawa hanya sebahagian daripadanya berjumlah RM37,300 terbukti telah dibayar. Ia merupakan kes perayu bahawa selepas dia melaksanakan perjanjian Julai dan selepas dia telah membuat deposit itu, dia mendapati bahawa penentang pertama, kedua, ketiga dan keempat tidak berupaya untuk memindahmilik

tanah itu kepadanya kerana ia tidak pernah didaftarkan atas nama mereka. Dia selanjutnya menuntut bahawa dia tidak akan bersetuju membeli tanah tersebut andainya penentang-penentang tidak memberi jaminan dan menggambarkan kepadanya bahawa harga belian yang harus dibayar kepada Cheok di bawah perjanjian Jun telah pun dibayar sepenuhnya dan bahawa pecah lot tanah tersebut akan dijalankan selepas pelaksanaan perjanjian Julai. Perayu menuntut, antara lain, bayaran balik deposit RM50,000 dan ganti rugi untuk salah nyata terhadap kelima-lima penentang. Sebaliknya, penentang pertama, ketiga dan keempat menafikan bahawa mereka telah menggambarkan apa-apa fakta kepada perayu tetapi bahawa perayulah yang telah memungkiri perjanjian kerana gagal membayar baki harga belian tanah tersebut pada tarikh penyempurnaan dan oleh yang demikian, mereka menamatkan perjanjian dan melucutkan deposit itu. Hakim perbicaraan menilai keterangan perayu sebagai tidak konsisten dan menolaknya sama sekali, atas alasan bahawa terdapat penyangkalan dalam keterangan perayu dan bahawa dia tidak boleh dipercayai. Perayu merayu terhadap penolakan tuntutannya.

**Diputuskan,** membenarkan rayuan dan memerintahkan bayaran balik kepada perayu:

Penyangkalan yang menonjol dalam keterangan perayu terletak dalam daya ingatannya yang kabur tentang amaun sebenar yang dibayarnya sebagai deposit di bawah perjanjian Julai. Oleh kerana penyangkalan terletak dalam satu aspek keterangannya dan bahawa konsesi dibuat bagi pihaknya bahawa hanya RM37,300 dibayar sebagai deposit, hakim perbicaraan telah menyalah arah dirinya apabila beliau gagal mengambil kira aspek-aspek lain testimoni perayu. Andainya beliau telah berbuat demikian, terdapat keterangan yang mencukupi bagi membangkitkan inferens bahawa penentang pertama, kedua, ketiga dan keempat mungkin telah menggambarkan apa-apa saja kepada perayu dalam usaha mereka untuk mendapatkan keuntungan secepat mungkin. Maka, hakim perbicaraan terkhilaf dalam menolak keseluruhan keterangan perayu atas dasar penyangkalan yang cuma menjejaskan satu aspek keterangannya. Beliau terlepas perhatian hakikat bahawa perjanjian-perjanjian saling membelakangi dan fakta-fakta kes ini yang luar biasa menyokong kebolehpercayaan hujah-hujah perayu dengan sepenuhnya.

Walaupun perjanjian Julai sepatutnya telah memberi notis kepada perayu bahawa penentang pertama, kedua, ketiga dan keempat bukanlah tuan punya berdaftar tanah tersebut, adalah mungkin bahawa representasi dalam cara yang digambarkan oleh perayu telah dilafazkan dan dia telah bertindak atasnya sehingga menjejaskannya. Di sini, penjejasan berlaku apabila depositnya sebanyak RM37,300 dilucutkan selepas penamatan perjanjian Julai. Pada masa yang sama, penentang pertama, kedua, ketiga dan keempat tidak berupaya untuk membuat permohonan kepada pihak-pihak berkuasa yang relevan

untuk memecahkan tanah selepas pelaksanaan perjanjian kerana mereka cumalah pemilik benefisial berbeza dengan pemilik berdaftar (lihat ms 742E–I dan 743A–C).]

**Notes**

For a case on discrepancy in evidence, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) para 1691.

**Appeal from**: Civil Suit No 25–643 of 1987 (High Court, Seremban)

*Joseph Yeo* (*Ng Thiang Tuan* with him) (*AJ Ariffin Yeo & Harpal*) for the appellant.

*D Krishna* (*R Ledchumiah* with him) (*Ramamoorthy Ledchumiah & Co*) for the respondents.

**Siti Norma Yaakob JCA** (delivering judgment of the court): In these proceedings, the plaintiff/appellant had maintained two causes of action against the five defendants/respondents. The first against all five respondents is for misrepresentation which the appellant claims induced him to execute a sale and purchase agreement dated 27 July 1984 with the first, second, third and fourth respondents to purchase an undivided half share in a piece of property from them. Additionally, the fifth respondent, an advocate and solicitor who acted for both the appellant and the first, second, third and fourth respondents in the sale transaction is also sued for negligence for breaching his duties as a solicitor. For these two causes of action, the appellant claims:

(1) a rescission of the sale and purchase agreement dated 27 July 1984 as against the first, second, third and fourth respondents;

(2) a refund of the RM50,000 deposit made under the agreement;

(3) damages for misrepresentation against all five respondents;

(4) damages for negligence as against the fifth respondent; and

(5) costs against all five respondents.

These matters are pleaded in the appellant's statement of claim.

On 23 November 1987, judgment in default of appearance was entered against the second respondent and that left the first, third, fourth and fifth respondents to defend the case which they did through two statements of defence, one filed by the first, third and fourth respondents jointly and the other by the fifth respondent separately.

The first, third and fourth respondents deny that they had misrepresented any fact to the appellant but that it was the appellant who had breached the agreement for failing to pay the balance of the purchase price of the land by the completion date and acting under cl 7 of the agreement, they terminated the agreement on 8 March 1985 and forfeited the deposit.

The fifth respondent also denied any misrepresentation or negligence on his part and counter-claimed for damages against the appellant for falsely and maliciously defaming him when the appellant lodged a complaint with the Secretary, Bar Council alleging misrepresentation and negligence on the part of the fifth respondent. The complaint had led to an inquiry being held on 10 May 1986 and after evidence was adduced, the Inquiry Committee held that the complaint did not disclose a case of professional misconduct against the fifth respondent. Despite this finding, the fifth respondent contends that the complaint had injured his character and reputation and, for this, counterclaimed for general and special damages, interest and costs against the appellant.

Faiza Tamby Chik J who heard the case, dismissed the appellant's claims with costs on the ground that there were contradictions in the appellant's evidence and that he could not be believed. The learned judge also dismissed the fifth respondent's counterclaim with costs on the ground that the appellant's complaint to the Bar Council was not made maliciously for the purpose of injuring the fifth respondent's character and reputation as an advocate and solicitor. The fifth respondent has not appealed against that finding but the appellant has appealed against the dismissal of his claims and hence the present proceedings before us.

At the trial in the High Court, the following facts were undisputed.

The land in question was and at the time of the trial still registered in the name of one Cheok Cheng Loon ('Cheok'). As a vendor, Cheok had entered into a sale and purchase agreement to sell the whole of the land covering an area of more than 21 acres to the first, second, third and fourth respondents for a consideration of RM263,244. The sale and purchase agreement dated 14 June 1984 ('the June agreement') was prepared by the fifth respondent who acted as the solicitor for both Cheok and the purchasers.

Six weeks later on 27 July 1984, the fifth respondent prepared a second sale and purchase agreement this time executed by the first, second, third and fourth respondents with the appellant, wherein the first, second, third and fourth respondents as vendors agreed to sell an undivided half share of the same land that they had purchased from Cheok to the appellant for the agreed price of RM650,000. It is this second sale and purchase agreement ('the July agreement') that the appellant relies to maintain his causes of action against the first, third, fourth and fifth respondents for misrepresentation and additionally for negligence against the fifth respondent. However before us, Mr Joseph Yeo, counsel for the appellant indicated that he was not claiming damages against the fifth respondent for deceit and we take this to mean that the appellant was not pursuing his claims of misrepresentation and negligence against the fifth respondent.

Under cl 1 of the July agreement, a 10% deposit of RM50,000 was acknowledged by the first, second, third and fourth respondents to have been received from the appellant but the evidence shows that only part of it amounting to RM37,300 was proven to have been paid. This is borne

A out by two receipts issued by the fifth respondent's firm dated 26 July 1984 for RM7,300 and another dated 22 August 1984 for RM30,000. Mr Harpal Singh, the appellant's counsel in the court below conceded that only RM37,300 of the deposit was made by the appellant under the July agreement and that the same sum of money was paid by the fifth respondent to Cheok on 25 August 1984 to make up the deposit and part of the balance of the purchase price due from the first, second, third and fourth respondents under the June agreement. This sum together with another RM3,000 were the only monies paid as consideration under the June agreement which eventually expired for non-performance on the part of the first, second, third and fourth respondents.

C It is the appellant's case that after he executed the July agreement and after he had made the deposit, he discovered that the first, second, third and fourth respondents had no capacity to transfer the property to him as the land was never registered in their names. He further claimed that he would not have agreed to purchase the property if the respondents had not assured and represented to him that the purchase price due to Cheok under the June agreement had already been paid in full and that subdivision of the property would be carried out upon the execution of the July agreement.

It was on the basis of the undisputed and proven facts that the learned trial judge assessed the appellant's evidence to be inconsistent and rejected it altogether. Before we consider the correctness of that finding, it is necessary that we delve a little bit further into the characteristics of the June and July agreements.

The fifth respondent has described the two agreements to be back-to-back agreements and by this we take it to mean that the performance of one agreement was very much dependent on the other, although it must be admitted that the appellant was not privy to the June agreement. The dependency of these two agreements is evident from the following undisputed facts:

(1) Nothing was paid as consideration under the June agreement until the first, second, third and fourth respondents received the RM37,300 deposit made by the appellant under the July agreement. On 25 August 1984, the fifth respondent paid the same amount of money to Cheok to fulfill the first, second, third and fourth respondents' obligation under the June agreement.

(2) The July agreement fixes a completion date in cl 2(b) but the June agreement is silent on this. To overcome this, Cheok and the first, second, third and fourth respondents varied the June agreement on 21 November 1984 ('the November agreement') to include a completion date at cl(b) in the November agreement, this being five months from the date of the November agreement, ie on or before 21 April 1985.

(3) Under the July agreement, had the appellant made the following payments:

(a) the deposit of RM50,000 under cl 1; and

(b) the first instalment of the balance of the purchase price amounting to RM275,000 under cl 2(a) on or before 26 January 1985,

the two sums totalling RM325,000 would be more than sufficient to enable the first, second, third and fourth respondents to fulfill their obligation to settle the full purchase price of RM263,244 under the June agreement.

(4) The presence of cl 2(b) in the July agreement is yet another indicator. Under that clause, the second instalment of the balance of the purchase price amounting to RM325,000 was to have been paid by the appellant within one month of receipt of a notice in writing from the first, second, third and fourth respondents to the effect that a separate issue document of title in respect of the undivided half share has been issued by the relevant authorities.

Unfortunately, the learned trial judge failed to consider any of the above factors and the effect they might have on the appellant's claims. Instead, he disbelieved the appellant altogether as he found that the appellant had contradicted himself.

A perusal of the notes of evidence shows that the so-called contradictions appearing in the appellant's evidence lie in his poor recollection of the amount he actually paid as deposit under the July agreement. Whilst he was able to testify that he made a cash payment of RM7,300 on 26 July 1984 and a second payment of RM30,000 through a cheque issued by Messrs Mohd Ibrahim & Co, a firm of solicitors who had acted for him in the sale of his house, the appellant was rather confused as to whether he paid the balance of the deposit amounting to RM12,700 to any of the five respondents. This state of affairs had led to his own counsel conceding that only RM37,300 was paid as deposit under the July agreement. Since the contradiction lies in one aspect of his evidence and that there was a concession made on his behalf that only RM37,300 was paid as deposit, we consider that the learned trial judge had misdirected himself when he failed to consider the other aspects of the appellant's testimony. Had he done so, there is sufficient evidence for him to conclude that the circumstances surrounding the executions of the June and July agreements and their dependence on each other might well have given rise to the inference that the first, second, third and fourth respondents could have represented anything to the appellant in their efforts to make a quick gain.

In this instance, the appellant performed his obligations by paying part of the deposit due from him despite the fact that cl 2(b) of the July agreement should have put him on notice that the first, second, third and fourth respondents were not the registered proprietors of the land. This shows that the presence of such clauses did not preclude the probability that representations in the manner described by the appellant were uttered and that the appellant acted upon them to his detriment. In this instance, that detriment happened when he parted with the RM37,300 deposit and the loss of that sum of money when the first, second, third and fourth

respondents forfeited it upon the termination of the July agreement on 8 March 1985.

As for the appellant's complaint that such forfeiture is illegal as the first, second, third and fourth respondents had breached cl 3 of the July agreement by their failure to apply to the relevant authorities to partition the land upon the execution of the agreement, that requirement is a non-issue as being only beneficial owners as opposed to registered owners, they had no capacity to make such an application in the first place.

We think that the learned trial judge erred in rejecting the whole of the appellant's evidence on the basis of contradictions which only effected one aspect of his evidence. He overlooked the fact that the back-to-back agreements and the unusual facts of this case wholly supported the credibility of the appellant's contentions.

Since the July agreement had already been terminated, the only loss suffered by the appellant was the forfeiture of the deposit and the right to the enjoyment of the money. To compensate the appellant for his losses, we allowed his appeal to the extent that the first, third and fourth respondents refund the sum of RM37,300 to the appellant with interest thereon at the rate of 8% per annum from 30 March 1995 (date of the High Court order) to date of realization. We made no order as to costs of this appeal as the appellant was only partially successful in his claims and we also ordered that the deposit for costs be refunded to him.

*Appeal allowed. Respondents ordered to refund deposit to the appellant.*

Reported by David Lai